

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
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1998 Biennial Regulatory Review –)
Petition for Section 11 Biennial Review)
Filed by SBC Communications, Inc.,)
Southwestern Bell Telephone Company,)
Pacific Bell, and Nevada Bell)
)

CC Docket No. 98-177

To: The Commission

**COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby comments on the Notice of Proposed Rulemaking released on November 24, 1998 in the above-captioned proceeding.¹ The Commission initiated the NPRM in response to SBC Communications, Inc.'s ("SBC") Petition for Section 11 Biennial Review, filed May 8, 1998 ("SBC Petition"). In its Petition, SBC asked the Commission to detariff special access services, direct trunked transport, operator services, directory assistance and interexchange services pursuant to Section 11 on the basis that those services allegedly are competitive. SBC Petition at 21-23.

The NPRM seeks comment on SBC's assertion that special access services, direct trunked transport, operator services, directory assistance and interexchange services are

¹ 1998 Biennial Regulatory Review – Petition for Section 11 Biennial Review Filed by SBC Communications, Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell, CC Docket No. 98-177, Notice of Proposed Rulemaking, (released November 24, 1998), FCC 98-238 ("NPRM"). Apart from its opposition to SBC's detariffing proposal, CompTel takes no position at this time on other proposals addressed in the NPRM.

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competitive. NPRM at ¶9. The NPRM also asks whether detariffing would be appropriate as an exercise of the FCC's section 10 forbearance authority, *id.*, despite the fact that SBC based its petition for detariffing on Section 11. The Commission also requests those favoring detariffing to indicate whether they favor permissive or complete detariffing. *Id.*

As an initial matter, CompTel agrees with the Commission's apparent recognition that it does not have the statutory authority to order detariffing under Section 11, because tariffing is required by Section 203 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). Section 10 is the sole statutory mechanism for considering whether to forbear from applying the statutory tariffing requirements, and CompTel submits that mandatory detariffing does not meet the forbearance standards of Section 10.

Further, as a procedural matter, CompTel believes that it would be inappropriate to consider Section 10 forbearance as part of this biennial review proceeding pursuant to Section 11. Instead, the Commission should consider forbearance from applying the tariffing provisions of Section 203 in specific geographic markets on a case-by-case basis, or as a generic matter in CC Docket No. 96-61. SBC and U S West have already filed petitions requesting Section 10 forbearance for specific geographic markets, and CC Docket No. 96-61 is an ongoing proceeding which directly addresses that issue.

In any event, CompTel strongly opposes SBC's mandatory detariffing proposal. SBC has not established a record to show that the statutory forbearance criteria are satisfied. Even with respect to the single issue it addresses – whether the specific market segments it identifies are competitive – SBC far overstates the case. Certainly, for services such as special access and direct-trunked transport, alternative facilities-based providers are at best nascent and

at worst non-existent. Lastly, mandatory detariffing is particularly inappropriate for dominant service providers such as SBC and other incumbent local exchange carriers.

I. SECTION 10, NOT SECTION 11, IS THE STATUTORY MECHANISM FOR CONSIDERING DETARIFFING PROPOSALS

SBC petitioned the Commission to detariff special access services, direct trunked transport, operator services, directory assistance and interexchange services pursuant to Section 11, because it asserts that these services are competitive in “revenue rich urban markets.” SBC Petition at 21. CompTel respectfully submits that the Commission lacks the statutory authority to adopt a detariffing policy under Section 11. 47 U.S.C. §161. Section 11 requires the Commission to “review all regulations under this act in effect at the time of the review that apply to the operations or activities of any provider of telecommunications services” and “repeal or modify any regulation it determines to be no longer necessary in the public interest” “as the result of meaningful economic competition between providers of such service.” *Id.*

Section 11, however, does not provide the Commission the authority to forbear from applying provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the “Act”). Unlike Section 10, which requires the Commission to “forbear from applying any regulation or any provision of this Act” when the Commission determines that forbearance is justified based on specified factors, Section 11 requires the Commission to “repeal or modify any regulation” when the Commission determines that it is no longer necessary in the public interest as a result of meaningful economic competition between providers of such service. Thus, the Commission can forbear from applying provisions of the Act pursuant to Section 10, but it cannot repeal or modify statutory requirements, such as the Section 203 tariffing requirement, pursuant to Section 11.

**II. THE COMMISSION DOES NOT HAVE THE STATUTORY AUTHORITY
TO ORDER MANDATORY DETARIFFING UNDER SECTION 10**

Although Section 10 is the proper mechanism for determining whether the Commission should forbear from applying the tariffing requirements of Section 203, CompTel respectfully submits that mandatory detariffing fails to meet the Section 10 standard. Section 10 directs the Commission "to forbear from applying any regulation or any provision of this Act," subject to certain exceptions not applicable here, upon a determination that: 1) enforcement is not necessary to ensure just and reasonable rates and practices; 2) enforcement is not necessary to protect consumers; and 3) forbearance is in the public interest. 47 U.S.C. §160. SBC has not made any showing that these statutory criteria have been satisfied here.

CompTel and numerous other parties have demonstrated to the Commission at length why mandatory detariffing does not satisfy the statutory forbearance criteria. *See, e.g.*, CompTel Comments on Petitions for Reconsideration In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61 (filed Jan. 28, 1997); CompTel Comments In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61 (filed April 25, 1996). Without repeating that showing in detail here, CompTel would emphasize that mandatory detariffing cannot be justified for SBC and other dominant carriers who have the ability to use their market power to undermine competition and harm consumers. Even for non-dominant carriers, mandatory detariffing does not satisfy the Section 10 criteria because it would impose upon those carriers new, affirmative obligations to cancel their tariffs and to convert to a carrier-customer individual contact system. The

Commission has acknowledged that such an obligation will impose increased administrative burdens upon carriers, *See* Second Report and Order at ¶138, which presumably will cause higher rates for consumers. Mandatory detariffing therefore would entail a result that Congress did not intend when it established Section 10.

Moreover, mandatory detariffing would be contrary to the express language of Section 10, which states that the Commission “shall forbear from applying any regulation or provision of this Act” when the statutory standards are satisfied. By its terms, that provision authorizes the Commission to remove existing requirements, not to impose new ones. However, mandatory detariffing would impose upon carriers obligations to which they were not previously subject. Carriers would be obligated to terminate their existing tariffs and to replace them with contractual arrangements. For these reasons, mandatory detariffing does not satisfy the forbearance criteria in Section 10.

III. THE CURRENT PROCEEDING IS NOT THE PROPER FORUM FOR CONSIDERING PERMISSIVE DETARIFFING PURSUANT TO SECTION 10

CompTel submits that permissive detariffing for dominant carriers could not meet the statutory standard for Section 10. However, as even SBC’s petition implicitly shows, the current proceeding is the wrong forum for addressing that issue. In its petition, SBC asserts that “high capacity special access services are generally concentrated in revenue rich urban markets” as opposed to all markets nationwide, claiming that a “quick analysis of data for major markets supports the conclusion that direct substitutes for special access services exist and are being used by LEC customers.” SBC Petition at 21-23. In its quick analysis, SBC discusses only Dallas, Los Angeles, Houston, New York, Chicago, and Los Angeles. *Id.* While CompTel disagrees with SBC’s “quick analysis” of competitive conditions in those markets, even SBC does not

dispute that competition for its specified market segments does not exist on a nationwide basis today. *Id.*

At most, SBC's contention that vigorous competition exists in specific geographic markets would support the filing of Section 10 forbearance petitions on a market-by-market basis. Both SBC and U S West already have filed such requests, thereby confirming that it is manifestly premature to consider a nationwide detariffing rule based upon alleged developments in competitive conditions.

In any event, nationwide detariffing is the subject of a more comprehensive review in the proceeding entitled "In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended," CC Docket No. 96-61. In the Second Report and Order, the Commission determined that the forbearance criteria in section 10 were met for mandatory detariffing of interstate, domestic, interexchange service offered by nondominant interexchange carriers. Several parties appealed the Second Report and Order to the United States Court of Appeals for the District of Columbia Circuit and filed motions requesting the court stay the Second Report and Order pending judicial review. On February 13, 1997, the court granted these motions, and stayed the Commission's rules adopted in CC Docket No. 96-61 until the court issues its determination on the merits of the appeal. Accordingly, nondominant interexchange carriers are currently required to file tariffs for their interstate, domestic, interexchange services. CompTel submits that it would be inappropriate to consider detariffing in this proceeding, and that the Commission should only consider detariffing in CC Docket No. 96-61 or in petitions requesting forbearance under Section 10 on a specific geographic market-by-market basis.

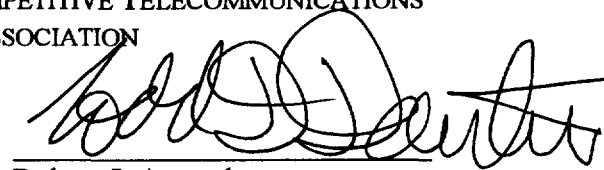
CONCLUSION

For the reasons stated above, CompTel urges the Commission not to adopt or consider any detariffing proposals as part of this proceeding.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS
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January 11, 1999

CERTIFICATE OF SERVICES

I, Mary E. Bernstein, hereby certify that on this 11th day of January, 1999, I caused true and correct copies of the foregoing **COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION** to be served via hand delivery upon those persons listed below.

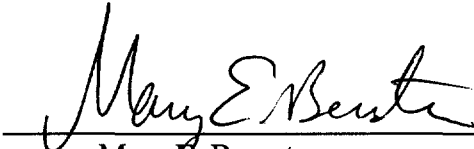
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